

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Excel Corporation, Schuyler Facility
Schuyler, Nebraska

Respondent

Proceedings under
Section 309(a)(3)
of the Clean Water Act,
33 U.S.C. § 1319(a)(3)

)
) Docket No. CWA-07-2003-0107
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) FINDING OF VIOLATION
) ORDER FOR COMPLIANCE
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Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance ("Order") issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA Region VII, and redelegated to the Director of Region VII's Water, Wetlands, and Pesticides Division.
2. The Respondent is Excel Corporation ("Respondent"), which owns and operates a beef slaughter and processing facility ("Facility") located at 590 Road 9, Schuyler, Nebraska 68661. The Facility is a high volume beef slaughter and processing plant that currently slaughters approximately 4,500-5,000 head of cattle per day.

Statutory and Regulatory Authority

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."
6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under C.F.R. Part 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, sewage, biological materials and agricultural waste discharged to water.
8. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged."
9. "Waters of the United States" are defined in 40 C.F.R. Part 122.2 to include intrastate rivers and streams, and tributaries thereto.
10. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the state of Nebraska with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the CWA, the Nebraska Environmental Protection Act (Secs. 81-1504 (11), Reissue 1987), and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Factual Background and Findings of Violation

11. Excel Corporation is a corporation and therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.
12. Excel Corporation owns and operates a beef slaughter and processing facility ("Facility") located at 590 Road 9, Schuyler, Nebraska, 68661.
13. Respondent was issued an NPDES permit December 11, 2000, that became effective January 1, 2001, and expired at midnight June 30, 2002. Respondent has timely filed an

application for a subsequent permit, therefore permit conditions of the December 11, 2000, permit are applicable until a new permit is issued.

14. Respondent's NPDES permit in *Part III. A.1. General Requirements* states that waste water shall not cause: noxious odors, floating, suspended, colloidal or settleable materials that produce objectionable films, colors, turbidity, or deposits.
15. Respondent's NPDES permit designates Shonka Ditch as the receiving waters for discharge from the Facility at Outfall 001.
16. Effluent from the Facility discharges from Outfall 001 into Ehemberger Ditch which is a tributary of Shonka Ditch. Shonka Ditch is a tributary of Lost Creek.
17. Shonka Ditch is classified as a Class B warm water and Class A agricultural stream and is subject to Title 117 of the Nebraska Water Quality Standards. Chapter 4, Section 5 of Title 117 states that the aesthetics clause applies to all waters of the state. To be aesthetically acceptable, waters should be free from human induced pollution which causes: (1) noxious odors; (2) floating, suspended colloidal, or settleable materials that produce objectionable films, colors, turbidity, or deposits and; (3) the occurrence of undesirable or nuisance aquatic life.
18. On April 3, 2001, and May 20, 2002, EPA personnel conducted inspections of the Facility.
19. At the time of the April 2001 and May 2002 EPA visits, the discharge at Outfall 001 appeared brown and activated sludge solids could be observed in the receiving ditch, Ehemberger Ditch. Solids were also observed in the water flowing in Shonka Ditch. Pockets of solids from the facility were also observed accumulating in Shonka Ditch.
20. The presence of floating and suspended colloidal and settleable material is a violation of the Facility's NPDES permit *General Requirements* and Title 117 of the Nebraska Water Quality Standards.
21. Respondent's NPDES permit in Part I entitled *Effluent Limitations and Monitoring Requirements* limits the concentration of Total Residual Chlorine (TRC) to a 30-day Average of 0.02 mg/L for the entire year and a Daily Maximum of 0.04 mg/L during the summer season (April 1 through October 31) and a Daily Maximum of 0.03 mg/L during the winter season (November 1 through March 31).
22. Daily Monitoring Reports ("DMR"s) for the period from August 1, 2002, to January 1, 2003, provided by the Facility to EPA, indicate that the concentrations of TRC are less than 1 mg/L. From the data provided, it is impossible to determine if Respondent is in

compliance with its permit requirements because Respondent uses a method to measure the TRC with a detection limit that is not adequately sensitive.

23. Respondent failed to demonstrate compliance with the effluent limits and monitoring requirements of its NPDES permit for TRC.
24. Appendix A, Section E, paragraph 1 of Respondent's NPDES Permit entitled *Proper Operation and Maintenance* states that Respondent shall, at all times, maintain in good working order and operate as efficiently as possible, any facilities or systems of control in order to achieve compliance.
25. During the April 2001 inspection, the West lagoon at the Facility was completely full with no remaining freeboard, the lagoon had overtopped its east berm, and the berm was eroded in places. Failure to ensure adequate freeboard exceeds the engineering specifications for the structure and increases the risk that the embankment could fail. Embankment failure could result in the discharge of millions of gallons of untreated effluent to waters of the United States.
26. Failure to ensure that the Facility's lagoons maintain adequate freeboard and the failure to prevent overflows and erosion of the lagoon embankment are failures to maintain the facilities or systems of control in good working order as required by the NPDES Permit.

Order For Compliance

Based on the Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

27. Respondent shall, at all times, maintain its lagoons in good working order and operate its lagoons as efficiently as possible. Specifically, Respondent shall operate the West Storage Lagoon in a manner that will maintain at least two (2) feet of freeboard, thereby protecting the integrity of the structure's embankments. Respondent will monitor the freeboard level in all of its lagoons, and use appropriately installed gauges to accurately measure freeboard. If the embankments of a lagoon vary in height across the perimeter of the lagoon, Respondent will install a gauge to monitor the freeboard at the lowest elevation location for the top of the embankment. Respondent will certify to EPA in writing within thirty (30) days that it has installed appropriate gauges to monitor the lagoons. Respondent will inspect the freeboard level in the West Storage Lagoon at least once each week, and will maintain a record on-site of the date of each inspection, the level of freeboard, and name of the inspector. These records shall be maintained for five (5) years from the date of each inspection. Respondent will continue to monitor freeboard as described above, until the NPDES operating permit is re-issued by NDEQ, at

which time Respondent will comply with the specific requirements in the permit related to freeboard and lagoon maintenance.

28. Respondent shall immediately cease discharges that cause noxious odors, floating, suspended, colloidal or settleable materials that produce objectionable films, colors, turbidity, or deposits in violation of its NPDES permit. Respondent shall provide EPA, within sixty (60) days of the Effective Date of this Order, a plan to demonstrate that Respondent can operate the facility in compliance with *General Requirement A.1.* of its NPDES permit. The plan shall propose a methodology to determine the optimal operating conditions for the wastewater treatment process that result in minimization of TSS levels in the discharge, and to demonstrate that the treatment and solids removal provided by the wastewater treatment plant are adequate to avoid deposition of solids in Ehrenberger Ditch and Shonka Ditch. Any methodology proposed by Respondent shall include monitoring data for TSS concentration in the discharge and shall evaluate the relation between TSS levels in the discharge and visible floating and/or deposited solids in the receiving streams for Respondent's permitted outfall. The work required by the proposed plan shall culminate in a report to EPA and NDEQ.
29. Respondent shall immediately implement a 40 C.F.R. Part 136 approved measurement process for Total Residual Chlorine that provides a detection limit sufficiently sensitive to demonstrate the Facility is compliant with the effluent limitations and monitoring requirements of its NPDES permit.
30. EPA will review Respondent's submissions and will notify Respondent in writing of EPA's approval or disapproval of each such submission. Upon approval, Respondent shall implement the plan. In the event of EPA's disapproval, EPA shall specify in writing any deficiencies in the submission. Within thirty (30) calendar days of receipt of EPA comments, Respondent shall modify the submission to incorporate EPA's comments, and shall submit the amended submission to EPA. Upon resubmission, EPA may either approve the document, or if EPA determines that the document does not adequately address the comments provided by EPA, EPA may unilaterally modify the document, and will provide Respondent with a copy of the document as modified by EPA, to be implemented in accordance with any modifications. If, upon resubmission, a document, or portion thereof, is unilaterally modified by EPA or is determined by EPA to fail to meet the objectives of this Order, Respondent shall be deemed to have failed to submit such document in compliance with this Order and therefore in violation of the requirements of this Order. Such a violation may subject the Respondent to penalties pursuant to paragraph 38 of this Order.

Effect of Order

31. Compliance with the terms of this Order shall not relieve Respondent of liability or preclude EPA from initiating an administrative or judicial enforcement action to recover penalties or seek additional injunctive relief for any violations of the CWA, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.
32. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.
33. Nothing in this Order shall limit EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
34. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.
35. If any provision or authority of this Order, or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.
36. All submissions to EPA required by this Order shall be sent to:

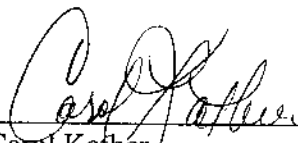
 Jamie Bernard-Drakey
 Environmental Engineer
 Water, Wetlands, and Pesticides Division
 U.S. Environmental Protection Agency - Region VII
 901 N. 5th Street
 Kansas City, KS 66101
37. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, Respondent will describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further

notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

38. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$27,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).
39. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

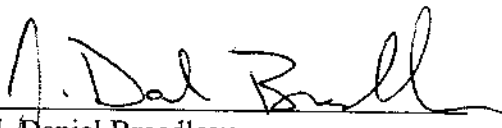
Date

4/15/03


Carol Kather
Acting Director
Water, Wetlands, and Pesticides Division
EPA Region VII

Date

4/15/2003


J. Daniel Breedlove
Assistant Regional Counsel
EPA Region VII

CERTIFICATE OF SERVICE

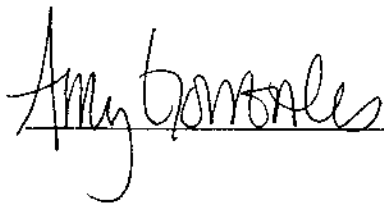
I certify that on the date noted below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.


I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following registered agent for Excel Corporation.

Mr. Vaughn Blum, General Manager
Excel Corporation
P.O. Box 544
Schuyler, Nebraska 68661

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Nebraska:

Patrick W. Rice
Assistant Director
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, NE 68509





Date